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In the Supreme Court
of the United States

OCTOBER TERM, 1988

RONNIE OSCAR KITCHENS, et al.,
Petitioners,

v.

STATE OF OREGON ex rel.
ADULT AND FAMILY SERVICES DIVISION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF OREGON

BRIEF FOR PETITIONERS IN REPLY

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I. INTRODUCTION

The State's Response does not address the substantial conflicts created between the Oregon Court of Appeals' decision and Congress' goal of expedited establishment of paternity, consistent with the child's best interests (Petition 24). The State's omission emphasizes why petitioners' federal Title IV-A notice and Title IV-D defense claims are of national importance: because an adjudication of paternity "touches (the child's) interests far beyond the recovery of support payments." State ex rel AFSD v. Tuttle, 304 Or. 270, 275, 744 P.2d 990, 992 (1987); Michael H. v. Gerald D., ___ U.S. ___, 109 S.Ct. 2333, 2339 (1989).

While the State concedes that, under Oregon law, the putative father's "financial obligation (begins) accruing the

moment the child was born" (Response 14), the State refuses to acknowledge that a Title IV-A notice may prompt earnest concern for this "financial obligation," because many of these men are either "'unconscious of the birth'" or lack any "'ties to the mother.'" Lalli v. Lalli, 439 U.S. 259, 269 (1978). Despite the State's re-examination of the facts to portray petitioners as unworthy of having any constitutional rights, because of their private differences with, or lack of ties to, the mothers, there are no disputed issues of material fact with respect to petitioners' federal claims. This Court, therefore, need not re-examine the findings of fact of the state courts. Portland R., L. & P. Co. v. Railroad Commission, 229 U.S. 397, 411-412 (1913).

The State's resistance to Title IV-A notice as a mechanism to achieve Congress' goal of expedited establishment of paternity and Child Support Enforcement ("CSE") recapture (see, Family Support Act of 1988, Pub. L. 100-485, §§ 111, 121), further highlights a national problem of state reluctance to expedite Title IV-D paternity adjudications. See, Notice of Proposed Rulemaking, OCSE, Dept. of H.H.S., Federal Register, 15876, 15888-89, (Vol. 54, No. 74, April 19, 1989). It is, therefore, not surprising that the State of Oregon, while urging the appellate court below for a ruling on the merits, State ex rel AFSD v. Kitchens, 93 Or.App 685, 691, 763 P.2d 1196, 1199 (1988), now seeks to avoid a national and uniform decision on the merits by arguing that petitioners' federal claims are insub-

stantial and that "this Court lacks jurisdiction."

II. THE OREGON COURT OF APPEALS JUDGMENT IS FINAL -- A REMAND WILL EXTINGUISH PETITIONERS' FEDERAL CLAIMS

This case falls within the third exception to the rule of finality which this Court identified in Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 481 (1975):

> ". . . where . . ., if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, the governing law would not permit him again to present his federal claims for review."

Petitioners' federal claims will not survive for this Court to review, regardless of the outcome of the proceedings on remand. If the trial court finds that petitioners are not the biological fathers, the federal claims will be moot. If, on the other hand, paternity is estab-

lished, then the petitioner's federal claims will vanish.

With respect to petitioners' claim to assert Title IV-D defenses, the "law of the case" has established that only when an order is entered establishing paternity, may petitioners "bring into play" their federal claims. State ex rel AFSD v. Kitchens, supra, 763 P.2d at 1198. Contrary to the State's assertions (Response 8, 17), the plain meaning of the decision is that once the factual and statutory "issue of paternity" is decided (see, ORS 109.155(1) - Petition App. D-14), the state court is absolutely not free to consider whether or not fathers' constitutional claims will now undo the order establishing paternity. An adjudication of the issue of paternity, then, defeats the very basis for petitioners'

federal claim of a right to assert defenses to the adjudication of paternity itself.

As to petitioners' remaining federal Title IV-A notice claim, once paternity is established, the trial court has the option to either (1) rule that only adjudicated, biological fathers are entitled to Title IV-A notice or (2) rule that all identified, putative fathers are entitled to Title IV-A notice. Option 1 leads to an absurd, illogical result and eliminates the notice remedy outright because no practical means exist at the Title IV-A stage for differentiating between putative and biological fathers. Option 2 is also precluded by the "law of the case" which holds that putative fathers, as such, have no constitutional right to Title IV-A notice. State ex rel AFSD v. Kitchens,

supra, 763 P.2d at 1198. In addition, the trial court held that the absence of Title IV-A notice, together with the passage of a "substantial period of time ... with no association," operates as a constitutional time bar to state-initiated filiation proceedings (Petition 11-12). Assertion of such a federal "constitutional time bar" claim would also be prevented under governing state law. See, State ex rel AFSD v. Keusink, 69 Or. App. 324, 326, 684 P.2d 1239 (1984) review denied 298 Or. 238, 691 P.2d 482 (1984).

When a case is in this procedural posture, this Court has considered it sufficiently final to justify review, consistent with this Court's "pragmatic" approach normally taken to finality questions, Cox Broadcasting Corporation v. Cohn, supra, 420 U.S. at 486:

"...[T]he (trial) court could agree that (putative fathers may assert their federal constitutional claims after paternity is adjudicated to undo an order establishing paternity). But ...the (Oregon appellate) courts already have considered and resolved this issue in its earlier proceedings; if the (petitioners) were to raise it again in a new set of appeals, the courts below would simply reject the claim(s) under the law of the case doctrine. Law of the case principles are not a bar to this Court's jurisdiction, of course, and thus the (State) apparently would require the (petitioners) to raise a fruitless (federal) claim in the trial court, the (Court of Appeals), and the (Oregon) Supreme Court still another time before we re-grant certiorari on the question that is now before us.

The goals of finality would be frustrated, rather than furthered, by these wasteful and time-consuming procedures. Based on the unusual facts of this case, the justifications for the finality doctrine--efficiency, judicial restraint, and federalism (citation omitted)--would be ill-served by another round of litigation on an issue that has been authoritatively decided by the highest state court." Pennsylvania v. Ritchie, 480 U.S. 39, 48-49, n. 7 (1987) (emphasis added).

This case also falls within the fourth Cox exception to finality because "reversal ... on the federal (Title IV-A notice) issue would be preclusive of any further litigation on the relevant (state-initiated filiation) cause of action" and because a failure to grant review, immediately, will "seriously erode federal policy." Cox Broadcasting Corporation v. Cohn, supra, 420 U.S. at 482-483.

The unreviewed Oregon Court of Appeals' decision, by leaving unanswered the Title IV-A notice question, leaves an uneasy and unsettled constitutional posture that "might seriously erode federal policy in the area of (CSE recapture)...(and have) important implications for the regulation of (CSE programs) in other States." Goodyear Atomic Corp. v. Miller, ___ U.S. ___, 108 S.Ct. 1704, 1709 (1988).

III. THE STATE APPELLATE DECISION DOES NOT REST ON AN INDEPENDENT AND ADEQUATE STATE PROCEDURAL GROUND.

The summary judgment "sequence," which the State claims is independent and adequate, does not allow putative fathers, if they deny they are the biological fathers, the right to assert federal constitutional claims. The State judicial "sequence" for handling federal claims is inadequate because it conflicts with federal standing principles applied to putative fathers and, because, unlike the statutory presumption involved in Michael H. v. Gerald D., supra, 109 S.Ct. at 2340, it denies petitioners due process of law. (Petition 54-64).

Although this Court has long recognized that it must, sua sponte, refuse jurisdiction where standing is not present, see, e.g., Juidice v. Vail, 430 U.S.

327, 331 (1977), it has never done so where putative fathers have asserted federal claims. See, Lehr v. Robertson, 463 U.S. 248, 250 n.3 (1983); Quilloin v. Walcott, 434 U.S. 246, 252-255 (1978); Stanley v. Illinois, 405 U.S. 645, 647-650 (1972). In Michael H. v. Gerald D., supra, 109 S.Ct. at 2338, 2343, this Court did not, sua sponte, question Michael H.'s standing as a putative father to assert his federal due process claims nor did this Court require his biological paternity to be adjudicated as a pre-condition to this Court's assuming jurisdiction.

Where the state court holds that a party lacks standing to assert constitutional challenges because the "issue of fact" of paternity must, first, be adjudicated, and where numerous precedents of this Court hold that such an adjudication

of the "issue of fact" is unnecessary, the state grounds are not adequate. See, e.g., Staub v. City of Baxley, 355 U.S. 313, 319 (1958).

The State's constitutional basis for its decision, that petitioners have not been deprived of any liberty or property interest under either the federal or state constitution, State ex rel AFSD v. Kitchens, supra, 763 P2d at 1198, also does not constitute an independent and adequate state ground. The State has even conceded that the separation of state from federal issues is "not completely clear" (Response 7, n. 3), justifying the presumption that the federal issue predominates and that the state ground is not independent and adequate, Michigan v. Long, 463 U.S. 1032, 1040-1044 (1983), because "the decision below did not divorce the state constitu-

tional issue from the questions of federal law." ASARCO Inc. v. Kadish, ___ U.S. ___, 109 S.Ct. 2037, 2049 (1989).

The State's non-federal ground of estoppel is also not independent and adequate. First, a rule of Oregon summary judgment procedure has been used unreasonably to avoid a decision relative to federal rights:

> "(Appellate courts) do not rely on what may or may not be admitted in the briefs on appeal in determining the propriety of summary judgment but only the pleadings, depositions, affidavits and admissions on file and considered by the trial court." ORCP 47C; Falkenstein v. Pishioneri, 80 Or.App. 203, 206, 720 P.2d 1341, 1342-1343 (1986) (emphasis added).

Here, estoppel principles were never even considered by the trial court nor did they form the basis for the trial court's ruling from which an appeal was taken by the State. (Petition App. B-1 - B-11). Yet,

the Court of Appeals, referring to petitioners' brief below, based its decision upon state estoppel principles. State ex rel AFSD v. Kitchens, supra, 763 P2d at 1198. Because the Court of Appeals has not "strictly or regularly followed" its own procedural requirement "in determining the propriety of summary judgment," the state ground is not adequate. Hathorn v. Lovorn, 457 U.S. 255, 262-265 (1982); Barr v. City of Columbia, 378 U.S. 146, 149 (1964).

Secondly, the Court of Appeals utilized federal principles of standing in the context of its discussion of estoppel principles to establish a state procedural summary judgment "sequence". See, Warth v. Seldin, 422 U.S. 490, 498-501 (1975) (discussion of federal standing principles) as adopted in Kelly v. Silver, 25

Or.App. 441, 452, 549 P.2d 1134, 1140-41 (1976), as cited authority in State ex rel AFSD v. Kitchens, supra, 763 P.2d at 1198. Since the Court of Appeals' decision interweaves federal standing principles into the context of its summary judgment procedure to establish a trial court "sequence" for handling petitioners' federal claims which preclude petitioners from raising their federal constitutional claims before paternity is adjudicated, the decision does not rest upon independent and adequate state grounds. See, Oregon v. Kennedy, 456 U.S. 667, 671 (1982); Staub v. City of Baxley, supra, 355 U.S. at 319; ASARCO Inc. v. Kadish, supra, 109 S.Ct. at 2049.

IV. THE RELATIONSHIP OF CURRENT DECISIONS OF THIS COURT TO PETITIONERS' FEDERAL CLAIMS, WHICH THE STATE FAILED TO ADDRESS, DEMONSTRATES WHY PETITIONERS' FEDERAL CLAIMS ARE SUBSTANTIAL.

This Court may now apply its analysis of liberty interest, formulated in Michael H. v. Gerald D., supra, 109 S.Ct. at 2341, to determine if the State has a duty to give Title IV-A notice to putative fathers where the State, instead of terminating the parent-child bond, seeks to create that bond. If "the asserted liberty interest be rooted in history and tradition", Id., at 2342, and that "societal tradition," culminating in statutes and case law, has expected a putative father to nurture and support his child as soon as possible, consistent with the child's best interests, then this Court may decide that the State owes a constitutional duty to protect that "fundamental" liberty interest as soon as the State interacts with the welfare family.

Recently, this Court reviewed the State's duty owed to family members in DeShaney v. Winnebago County DSS, ___ U.S. ___, 109 S.Ct. 998 (1989). There, the Court held that the State has no due process duty to affirmatively protect family members from the private actions or injuries of third persons. Contrastingly, the issue, here, is whether the Fourteenth Amendment places "a limitation on the State's power to act" to establish paternity and support obligations, when the State becomes directly involved with the welfare family and it is within the State's control "to prevent government 'from abusing (its) power, or employing it as an instrument of oppression,'" Id. at 1003, by indefinitely withholding from putative fathers notice of the State's

intention to establish their paternity and accruing support obligations.

The coinciding equal protection issue is whether the State's policy of withholding Title IV-A notice from putative fathers withstands strict scrutiny, where the discrimination is based upon the child's illegitimacy, Gomez v. Perez, 409 U.S. 535, 538 (1973), or even if the State's policy "pursues a legitimate end by rational means." Michael H. v. Gerald D., supra, 109 S.Ct. at 2346. The State's goal is to determine both need and dependency, or "continued absence." (Aff. of Kathie Blair - App. B-3). Yet, the State offers no rational explanation for withholding notice from putative fathers, where the dependency of all illegitimate children, whose putative fathers have been located, is just as much an eligibility

issue as is the dependency of legitimate children whose married parents are divorcing and absent from the home.

The exclusion of putative fathers from decisions involving mothers' reproductive rights, on the one hand, and their delayed involvement, on the other hand, in matters of support obligations and responsibilities for their out-of-wedlock children, has left hundreds of thousands of putative fathers in a state of conflict and confusion with their children. Significantly, this Court has recently expanded the role given to states to regulate reproductive rights and to protect life, Webster v. Reproductive Health Services, ___ U.S. ___, 57 LW 5023, 5030-31 (July 3, 1989), and may continue to do so next term. Reflecting this greater responsibility being given to states, the

Court may require the State to notify putative fathers when "state action" impacts the welfare family, to ensure that the potentiality for, and sanctity of, familial bonding and decision making will not be unduly delayed by abusive and oppressive government omissions.

Petitioners' federal claims, therefore, involve substantial federal questions impacting family life -- matters of current concern to this Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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July 31, 1989

APPENDIX A

APPENDIX A

OREGON RULES OF CIVIL PROCEDURE (ORCP)
SUMMARY JUDGMENT - RULE 47

"...C. Motion and proceedings thereon. The The motion and all supporting documents shall be served and filed at least 45 days before the date set for trial. The adverse party shall have 20 days in which to serve and file opposing affidavits and supporting documents. The moving party shall have five days to reply. The court shall have discretion to modify these stated times. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

APPENDIX B

APPENDIX B

AFFIDAVIT OF KATHIE BLAIR:

"I am an Assistance Worker II at the S.E. Portland Adult and Family Services Division (AFS) office. I have been with AFS since 1976. As part of my job, I interview parents or other relatives who apply for aid to families with dependent children (AFDC). Under state and federal law, we must determine whether the applicant is eligible for assistance. Such eligibility depends on, among other things, whether the child has been deprived of parental support. Therefore, if the basis of the application is an absent parent, we must determine whether the parent is providing any support, in what manner, and how much. We therefore try to contact the absent parent. This contact is solely for purposes of deter-

mining the applicant's eligibility for AFDC.

"Our usual procedure is to send the absent parent an AFS 412 letter, a copy of which is [included herein as Appendix A]. We do not 'notify' an absent parent in the sense of informing him or her that the child seeks public assistance and that the absent parent will incur liability accordingly.

"Since at least 1981, on a case by case basis, we may send an AFS 412 letter to an unmarried father if the mother designates him as the absent parent when she applies for assistance. Again, the primary purpose is to determine whether the alleged father has been and still is providing any support that could affect the mother's and the child's eligibility. Our goal is to determine income and potential

resources to the child, as well as continued absence."